87-760

Supreme Court, U.S.
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No. _____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 18, 1987

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STATEMENT OF RELATED CORPORATIONS

Guy F. Atkinson Company is a subsidiary of Guy F. Atkinson Company of California. Willamette Iron & Steel Company, currently inactive, is a division of Guy F. Atkinson Company. Other divisions of Guy F. Atkinson Company include Atkinson Dynamics; Commonwealth Construction Company; Bingham-Willamette Company; Guy F. Atkinson Construction Company; Walsh Construction Company; Lake Center Industries; and Monterey Construction Company. Subsidiary corporations of Guy F. Atkinson Company include Atkinson KSA, Inc.; Atkinson Services; Atkinson Building Company; Atkinson Construction Company; Atkinson Development Company - Colbun; Guy F. Atkinson Construction Company, Ltd.; Atkinson-International (Aust.), Ltd.;

Atkinson-International Dominican Republic, Inc.; Atkinson-International Hong Kong, Ltd.; Bingham-Willamette Overseas; Columbia Services Company, Inc.; Commonwealth Construction Company; Equipment Engineering Corporation; Guy F. Atkinson Holdings, Ltd.; Guy F. Atkinson Company Export Company; Guy F. Atkinson Company - Overseas; Highway Rehabilitation Contractors; Lake Center Industries Transportation, Inc.; Offshore Hydro Services, Inc.; and Walsh Construction Company, Ltd.

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Respondents Willamette Iron and Steel Company and Guy F. Atkinson Company (hereinafter collectively referred to as "Wisco") respectfully oppose Petitioners' Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for

the Ninth Circuit affirming the dismissal of Petitioners' claims against Wisco.

OPINIONS BELOW

The Memorandum Findings of Fact, Conclusions of Law and Order for Judgment of the United States District Court for the District of Hawaii and the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1987. The petition for a writ of certiorari was filed on October 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly affirmed the dismissal of the Plaintiffs' claims against Wisco, finding that there was no foreseeable connection between Wisco's allegedly improper repair work and the accident that ensued.

STATEMENT OF THE CASE

This appeal arises out of an admiralty action instituted pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., for injuries sustained as a result of Donald Kong's fall on board the barge OAHU on December 24, 1980. (Petitioners' App. A, pgs. A-2 to A-10). The fall occurred while Mr. Kong, a supervisor for Castle & Cooke Terminals, and a group of longshoremen

were loading cargo aboard the OAHU. In carrying out the loading operations, the workers had to open and close the barge doors which were equipped with a cable and pulley system. (Petitioners' App. A, pgs. A-2, A-9 to A-10).

The cable system consisted of two winches, three pulleys, two turnbuckles, two gussets, and three cables: the open cable, the close cable and the follower cable. Two of the pulleys were located above and to the left of the port door and the third was above and to the right of the starboard door. The two winches were located to the left of the port door. One gusset was located at the top right of the port door, and the other was located at the top left of the starboard door. (Petitioners' App. A, pgs. A-3 to A-5).

The open cable was connected at one end to the open winch next to the port door. It then wound around one of the pulleys above the port door and connected to the left side of the port gusset. The close cable was connected at one end to the other winch, wound around the other pulley above the port door and connected to the left side of the starboard gusset. The follower cable, which operated to link one door's operation to the other, was attached on one end to the turnbuckle which was fastened to the right side of the port gusset. The follower cable then wound around the starboard pulley and connected to the turnbuckle attached to the right side of the starboard gusset. (Petitioners' App. A, pgs. A-4 to A-5).

When operated as designed, the doors opened by turning the open winch

so as to pull the port door to the left and simultaneously pull on the follower cable, forcing the starboard door to slide open to the right. The doors closed by turning the close winch which would pull on the starboard door, sliding the starboard door to the left. That movement also created a tension on the follower cable so that the port door would close to the right. (Petitioners' App. A, pg. A-5).

The OAHU's manual cable system was considered slow and tedious, however, so a practice had developed of using a forklift to pull the cargo house doors open and to push the doors closed. (Petitioners' App. A, pg. A-6). When employing the forklift method, slack in the cables was taken up by manual operation of the winch. Slack in the follower cable, however, could not be

taken up by the winches when opening the doors with the forklift unless the port door were pushed opened first. Additionally, slack could not be taken up when closing the doors with the forklift unless the starboard door were closed first. (Petitioners' App. A, pg. A-7). There was no evidence that Wisco had any knowledge that the forklifts were used to open and close the barge doors in lieu of the designed manual winch system.

Just prior to the accident, the workers had finished loading the cargo and were attempting to close the door with the forklift. In so doing, however, they incorrectly pulled the port door first. Slack consequently developed in the follower cable and the port door's cable. The men decided to take up that slack by manually operating the winch but could not find

the winch wheel. Despite that problem, the men continued to try to close the door with the forklift. Upon doing so the cables became entangled. (Petitioners' App. A, pgs. A-9 to A-10).

At that point one of the longshoremen, Mr. Wesley Furtado, climbed the batten boards on the barge doors to try to untangle the cables. Mr. Kong also climbed the batten boards and worked on the same cable line that Mr. Furtado had been manipulating in an attempt to free the cables. (Petitioners' App. A, pg. A-10). Mr. Kong did not use a safety device while carrying out his task even though safety belts were available. (App. A, pg. A-2 to A-3). When Mr. Kong reached the top of the door, he grasped the cables with both hands and yanked the cables with a whipping motion. Upon doing so, the follower cable separated

from a turnbuckle and Mr. Kong fell to the deck of the barge. (Petitioners' App. A, pg. A-10).

In October of 1980, two months prior to the accident, Wisco completed certain repair and maintenance work on the barge OAHU. Included within the repair work was the replacement of the opening and closing cables but not the follower cable. (Petitioners' App. A, pg. A-8).

After installing the new cables, Wisco adjusted the turnbuckles in the appropriate manner, lubricated them and covered them with canvas. (Petitioners' App. A, pg. A-8).

After the completion of Wisco's work, Hawaiian Marine Lines took over the custody and control of the vessel in order to carry out its cargo operations. Between the date of the completion of Wisco's work and the time

of the accident, the OAHU travelled from Portland to Honolulu, back to Portland, and then on again to Honolulu. (Petitioners' App. A, pg. A-10).

At the close of the Plaintiffs' case the District Court granted Wisco's motion to dismiss plaintiff's claims pursuant to Federal Rules of Civil Procedure, Rule 41(b). (Petitioners' App. A, pg. A-12).

ARGUMENT

The decision below affirming the district court's dismissal of the claims against Wisco is correct. There is no conflict between this Court's or any circuit court's prior decisions and that of the Ninth Circuit in the case at bar and there is no other basis for further review by this Court.

In Munsey v. Webb, 231 U.S. 150 (1913), this Court ruled that "[i]t was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." Id. at 156.

The United States Court of Appeals for the Fourth Circuit followed the Munsey rule in Virginian Ry. Co. v. Viars, 193 F.2d 547 (4th Cir. 1952), stating that "[t]o render one liable for negligence, it is sufficient that he should have foreseen that the negligence would probably result in injury of some kind to some person, and he need not have foreseen the particular consequence or injury that resulted." Id. at 550.

The Ninth Circuit's decision in the case at bar is not contrary to the rule

stated in Munsey, supra, and Virginian Ry. Co., supra. The appellate court herein did not rule that Wisco could not have foreseen the particular accident and resultant injury that Mr. Kong sustained; the court found that no evidence sustained a finding that Wisco could have foreseen the occurrence of any accident or injury as a result of a failure on its part to correctly repair the cables. (Petitioners' App. B, pgs. A-23, A-24). In that regard the court explained:

> There is no evidence in the record that would justify a finding that any reasonable repairman would have foreseen that workmen would place themselves in a position to be injured if the turnbuckle should work loose from the "following" cable installed to help pull the barge door open. The only foreseeable and untoward consequence of the turnbuckle coming loose in the proper operation of the winches would be that the door would not open, if closed, or close, if opened. Because the method chosen by the

> longshoremen to open the door consisted in pushing with a lift truck rather than pulling with the hand-operated winches (except to take up slack) there was no foreseeable connection between the repairman's alleged installation of the defective turnbuckle and the injury that befell this workman. More to the point, there was no reason for the repairman to foresee that any workman would climb up the door and use the cable for a handhold while shaking out slack caused by opening the door with a lift truck. Accordingly, we hold that there was no error in releasing Willamette Iron and Steel Company from liability ....

(Petitioners' App. B, pgs. A-23 to A-25).

The Ninth Circuit found support for its decision in the record below. That record is devoid of evidence establishing that Wisco could have foreseen such injuries.

In fact the only evidence that Plaintiffs did present on the issue of causation was in the form of oral

testimony by Plaintiffs' expert, Dr. Blundell. Dr. Blundell testified that if the doors had been operated appropriately by using the manual winch system rather than the forklifts, any improper repair work by Wisco would not have created a safety problem. (App. A, pg. A-5 to A-6). Assuming the proper operation of the doors, any deficiencies in Wisco's work would have created only an operational problem, preventing the workers from opening or closing the barge house doors. No evidence was presented to establish that Wisco knew that forklifts were being used to operate the barge doors in lieu of the manual winches. Consequently Wisco simply could not have foreseen that its repairs might cause the Plaintiffs', or anyone's, accident.

The dismissal of Plaintiffs' claims against Wisco was not based upon an erroneous application of this Court's enunciation of the limitations of the foreseeability requirement in Munsey v. Webb, supra. The dismissal of Wisco did not hinge upon a finding that Wisco could not have foreseen the particular method in which Mr. Kong's accident occurred. Rather, the decision was based upon a finding, supported by the evidence or lack thereof, that Wisco could not have foreseen any untoward consequences of its repair work that could be expected to endanger life or limb.

The Ninth Circuit's decision, therefore, was appropriate and does not conflict with either this Court's decision in Munsey v. Webb, 231 U.S. 150 (1913), or the Fourth Circuit's

decision in Virginian Ry Co. v. Viars, 193 F.2d 547 (4th Cir. 1952).

CONCLUSION

Respondents hereby respectfully request that this Honorable Court deny Petitioners' petition for a writ of certiorari.

DATED: November 18, 1987.

Respectfully submitted,



JAMES TYLER ESTES, JR.

Attorney for Respondents
WILLAMETTE IRON & STEEL COMPANY
and GUY F. ATKINSON COMPANY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME I of VII VOLUMES

PAGES 1-156

DATE: May 22, 1986

off the barge Oahu.

A No, not with his crew; just he himself. The gang was not helping.

Q Isn't it true also that there are safety belts provided for by Castle and Cooke Terminals for stevedoring operations?

A Yes.

Q And on the night of the accident the safety belts were available to you and your men.

A No.

Q Weren't the safety belts... .

A On this barge Oahu, we would have mostly what you call break bulk cargo and there were no containers on this particular barge so safety belts were not required on this particular barge.

Q I know, but weren't they available? Didn't Castle and Cooke have safety belts?

A Oh, we had safety belts, but, on this particular barge, there were no safety belts.

Q You didn't use belts on this project.

A Because it was not required.

Q Okay. You didn't use any safety belts on this project.

A No, I did not.

Q The safety belts were available that night if you wanted to get them, isn't that true?

A It was available, if needed.

APPENDIX A

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TRANSCRIPT OF PROCEEDINGS

VOLUME II of VII VOLUMES

PAGES 157 - 306

DATE: May 23, 1986

affect the way the doors open or close together.

MR. ESTES: Let me split it up then.

THE COURT: That was your first question.

MR. ESTES: That was the first part of the question.

THE COURT: Restate your question.

MR. ESTES: I'll be glad to.

Q Mr. Blundell, if you assumed that the operators of that bargehouse door are using only the manual winch system to open and close the doors, isn't it true that the absence of a lock wire on either or both of the port turnbuckles may create serviceability problems, if you will, in terms of or operational problems, in terms of getting the doors to close together appropriately or properly but would not in effect create any safety problems?

MR. JIM-ON: I still have a problem because the questions are couched in terms of possibility, and, secondly, it is compound.

THE COURT: You may answer.

A The basic need for the lock wire here is not from the primary point of view of safety. The battening up of the turnbuckles will, as you say, only cause problems particularly in terms of operation of not getting the doors to close exactly where you want them to be. That's one reason for the turnbuckle, yes, sir.

Q Do you have any opinion as to whether or not it's appro-

NO. _____

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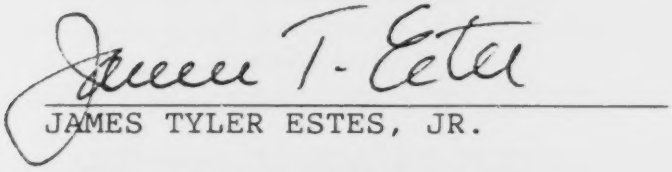
CERTIFICATE OF SERVICE

I, James T. Estes, Jr., a member of the bar of this Court, hereby certify that on the 18th day of November, 1987, three copies of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were served by personal delivery upon the following at the addresses shown below:

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I further certify that all parties required to be served have been served.



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